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IN THE

Supreme Court of the United States

October Term 1976

No. 76-385

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, COUNTY OF SANTA FE, NEW MEXICO

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September 14, 1976

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, COUNTY OF SANTA FE, NEW MEXICO

Opinions and Orders Below

Petitioner General Atomic Company ("GAC") seeks writs of certiorari directed (a) to the District Court of the First Judicial District, County of Santa Fe, New Mexico (the "Santa Fe Court"), to review its order of injunction

dated April 2, 1976 (the "Injunction"), and (b) to the New Mexico Supreme Court to review its order dated June 16, 1976, in which that Court quashed as improvidently granted an alternative (temporary) writ of prohibition directed to the Santa Fe Court, thereby leaving the Injunction in effect.

The Injunction prevents petitioner from exercising rights granted by the federal Constitution, federal statutes and the Federal Rules of Civil Procedure:

> "General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto."

The Injunction thus clearly prevents petitioner from prosecuting in any forum, including the federal courts, any claim petitioner may have against United Nuclear Corporation ("UNC") relating to the subject matter of a pending *in personam* action brought by UNC against petitioner in the Santa Fe Court. UNC seeks in that court to avoid contract obligations to deliver over 24,000,000 pounds of uranium having a present market value of approximately a billion dollars. The Injunction extends to an on-going federal proceeding in which petitioner previously had been made a party defendant by Indiana & Michigan Electric Company ("I&M") a public utility demanding delivery by petitioner of a substantial portion of that uranium, and

prevents petitioner from protecting itself as a defendant in the federal court through exercise of its rights to seek impleader or joinder of UNC under Fed. R. Civ. P. 14 or 19(a) in order to force UNC to deliver such uranium to petitioner.

The Injunction of the Santa Fe Court is annexed hereto as Appendix A. That court's reasons for granting the Injunction were set forth in a letter to the parties dated March 29, 1976, annexed hereto as Appendix B. On petitioner's application, the New Mexico Supreme Court issued an alternative writ of prohibition dated April 14, 1976, annexed hereto as Appendix C. The writ of prohibition had the effect of bringing the Injunction before the New Mexico Supreme Court for review of petitioner's claims that it was illegally issued, including the constitutional and other federal claims advanced in this Petition. On June 16, 1976, after briefing and immediately after oral argument, the New Mexico Supreme Court issued an order quashing the alternative writ of prohibition "as improvidently granted", leaving the Injunction in effect. That order is annexed hereto as Appendix D. Because no opinion was issued by the New Mexico Supreme Court, its reasons can best be ascertained from comments by the Court during oral argument. Relevant excerpts of a transcript of that argument are annexed hereto as Appendix E.*

Jurisdiction

The order of the New Mexico Supreme Court was entered on June 16, 1976. This Court has jurisdiction to issue a writ of certiorari under 28 U.S.C. § 1257(3).

The New Mexico Supreme Court reviewed the Injunction under a writ of prohibition. Under New Mexico law,

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* No official transcript was made. Appendix E was transcribed from a tape recording made by the Clerk of the Supreme Court.

a writ of prohibition issues "to prevent . . . [an inferior court] from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from going beyond its legitimate powers in a matter of which it has jurisdiction". *State ex rel. Harvey* v. *Medler,* 19 N.M. 252, 142 P. 376 (1914). The writ was issued on April 14, 1976, and prohibited the trial judge "from taking any action to enforce the . . . [Injunction] until the further order of this Court" and ordered him "to show cause . . . why you should not be so prohibited and restrained and further to show cause why this alternative writ herein issued should not be made permanent." * The order quashing that writ "as improvidently granted" was a final determination by the New Mexico Supreme Court, the court of last resort of the State, of the merits of petitioner's claim that the trial court had gone "beyond its legitimate powers" in issuing the Injunction.

The New Mexico Supreme Court considered and rejected petitioner's constitutional claims in reaching its decision. Before both the trial court and the New Mexico Supreme Court, petitioner contended that the federal Constution and statutes barred granting the Injunction, on the grounds set forth in this Petition. That contention was explicitly rejected by the trial court (Appendix B). Although the New Mexico Supreme Court issued no opinion, the briefs and arguments of the parties, as well as the remarks of counsel and the Court during oral argument (Appendix E), show that petitioner's constitutional claims were vigorously presented to, and considered by, the New Mexico Supreme Court.

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* It should be noted that, while the alternative writ prohibited the trial judge from taking any action to enforce the Injunction, it did not stay the Injunction's effectiveness. Thus, had petitioner taken any action against UNC after issuance of the writ, it would have been subject to retroactive sanctions for violating the Injunction once the writ was quashed.

It thus appears that the order of the New Mexico Supreme Court quashing the alternative writ "as improvidently granted" was grounded on rejection of the merits of petitioner's claim. For that reason petitioner seeks a writ of certiorari directed to the New Mexico Supreme Court. If the order was not so grounded, it was the equivalent of a refusal to hear a discretionary appeal. In that case, the decision of the Santa Fe District Court granting the Injunction was by "the highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257. Petitioner therefore also seeks a writ of certiorari directed to that court.

The Injunction is a "final judgment or decree" within the meaning of 28 U.S.C. § 1257. The questions presented by this petition are wholly separate from and independent of the merits of the state court action in which the Injunction was issued, and review of a final judgment in that action would not provide an opportunity for petitioner to obtain review of the Injunction. See *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949). The Injunction would not be merged in such final judgment. Moreover, the injury petitioner seeks to avoid will already have been inflicted, since such judgment would, absent the most extraordinary circumstances, be determinative of petitioner's substantive rights in other litigation which it has been restrained from pursuing. See *Local No. 438* v. *Curry,* 371 U.S. 542 (1963).

Questions Presented

1. Can a state court in an *in personam* action constitutionally enjoin a defendant, also a defendant in a pending federal court action instituted by a different plaintiff, from impleading or moving to join pursuant to Fed. R. Civ. P. 14 or 19(a) the state court plaintiff as a party in such federal action?

2. Can a state court in an *in personam* action constitutionally enjoin a defendant from instituting an action in a federal court?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are U.S. Const. Art. III, § 1, U.S. Const. Art. VI and 28 U.S.C. § 2072, which provide in relevant part:

U.S. Const. Art. III, § 1:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . ."

U.S. Const. Art. VI:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

28 U.S.C. § 2072:

> "The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions and the practice and procedure of the district courts and courts of appeals in civil actions. . . ."

Also involved are Fed. R. Civ. P. 14(a) and 19(a), which provide in relevant part:

Fed. R. Civ. P. 14(a):

> "When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

Fed. R. Civ. P. 19(a):

> "Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

Statement

Background

The action below is one of several lawsuits arising from five long-term contracts for supply of uranium and uranium fuel assemblies entered into between UNC and each of four utilities during the period 1967-1971 (the utility contracts). In a series of agreements in 1971, UNC assigned those contracts to petitioner's predecessor Gulf United Nuclear

Fuels Corporation ("GUNFC"), a corporation formed by Gulf Oil Corporation ("Gulf") and UNC. On the occasion of the assignments, UNC guaranteed GUNFC's performance of all the utility contracts and UNC remained obligated to the utilities on three of the five contracts to supply the uranium required to perform those contracts. UNC also entered into a Uranium Supply Agreement with GUNFC which obligated UNC to supply to GUNFC the required uranium. In 1973, Gulf bought out UNC's interest in GUNFC. In connection with the buy-out the parties entered into a revised Uranium Supply Agreement, providing that:

> "UNC shall sell to the Corporation [GUNFC, now General Atomic] and the Corporation shall purchase from UNC all the Concentrates (including those concentrates to be used in reload fuel assemblies to be fabricated by the Corporation) which the Corporation is required to supply pursuant to the . . . [utility contracts]. . . . The Concentrates . . . shall be provided in accordance with the terms and conditions, including price, of the applicable [utility contract], as required by the buyer and as specified in this Agreement."

Thereafter Gulf entered into a partnership with Scallop Nuclear, Inc., whereby the two companies formed petitioner, General Atomic Company. Gulf assigned its rights and obligations under the 1973 Uranium Supply Agreement and the utility contracts to petitioner.

From 1967 to mid-1973, the market price of uranium remained relatively stable at about $7 per pound, and the contracts for the most part call for delivery of uranium at about that price (subject to limited escalation). Since the latter part of 1973, the market price of uranium has advanced dramatically, and is now some $40 per pound. The difference between contract price and market price for the uranium remaining to be delivered by UNC to petitioner under the 1973 Uranium Supply Agreement is in excess of $600,000,000.

The New Mexico State Court Action

Seeking to avoid continued performance of its obligation to supply uranium to GAC at the contract prices, UNC stopped delivery in 1975 and commenced a declaratory judgment action against petitioner and its constituent partners individually in the District Court for the First Judicial District, County of Santa Fe, New Mexico, on August 8, 1975, alleging among other things mutual mistake, breach and commercial impracticability. After Gulf, which is of diverse citizenship to UNC, removed the entire case to the United States District Court for the District of New Mexico under 28 U.S.C. § 1441(c), UNC on December 31, 1975, took a voluntary non-suit as of right pursuant to Fed. R. Civ. P. 41 (a) (1) (i). The same day UNC instituted the instant action, which is virtually identical to the previous action except that it names only petitioner as a defendant. Inasmuch as both UNC and Scallop Nuclear, the other partner of petitioner, are Delaware corporations, petitioner was unable to remove.* UNC's obvious purpose for this maneuver was to keep the action in state court.**

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* In its original complaint, UNC had also alleged fraud and breach of fiduciary duty by Gulf in connection with the formation, operation and dissolution of GUNFC and the procurement of a release from UNC of its claims against Gulf in connection with Gulf's buy-out of UNC's interest in GUNFC in 1973. After UNC brought the instant action without naming Gulf individually as a defendant, Gulf filed an action on January 23, 1976, in the United States District Court in Albuquerque, New Mexico, for a declaratory judgment that the release was valid.

** The desire of UNC, a substantial New Mexico employer, to have its controversies with GAC and I&M resolved in courts within the State is understandable. But that does not explain why UNC took a non-suit and dropped a party in order to prevent removal to the Federal District Court in New Mexico.

On May 18, 1976, after issuance of the alternative writ of prohibition and shortly before oral argument before the New Mexico Supreme Court on the permanent writ, it was reported that Justice Donnan Stephenson of that Court intended to resign from the Court

The New York Federal Court Action

On February 24, 1976, Indiana & Michigan Electric Company ("I&M"), one of the utilities with which UNC had originally contracted for the supply of uranium and uranium fuel assemblies, commenced an action against petitioner in the United States District Court for the Southern District of New York, seeking specific performance, damages and declaratory relief for petitioner's alleged failure to make deliveries to I&M. I&M did not name UNC as a defendant, although UNC remained liable on its original contract with I&M, had guaranteed performance thereof, was of diverse citizenship to UNC, and was clearly subject to suit in that District.

Issuance of the Injunction

Shortly thereafter, on March 15, 1976, anticipating that petitioner would implead it in the New York federal action pursuant to Fed. R. Civ. P. 14(a),* UNC applied for and

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as of June 30, 1976, to join the firm representing UNC. It was noted that, while Justice Stephenson "had not committed himself to any particular litigation", the move would leave him "free to participate in what could be the largest civil suit, money-wise, pending in the world". *Albuquerque Journal,* May 18, 1976, p. 1. Since his resignation Mr. Stephenson has in fact taken an active role in the case.

* Petitioner had already indicated its desire to have the entire controversy determined in a single forum by filing on January 19, 1976, a complaint in interpleader and in the nature of interpleader pursuant to 28 U.S.C. § 1335 in the United States District Court in Albuquerque, New Mexico. The complaint named as defendants UNC, I&M and the three other utilities whose contracts with UNC were assigned to petitioner's predecessor. Petitioner sought determinations binding on all parties as to its respective rights and obligations under the 1973 Uranium Supply Agreement and the utility contracts. On March 2, 1976, the Court granted the defendants' motions to dismiss the action on the ground that subject matter jurisdiction under the interpleader statute was lacking. Petitioner's appeal is now pending in the United States Court of Appeals for the Tenth Circuit.

On September 9, 1976, in a further effort to find a federal forum where both I&M and UNC are parties, GAC moved pursuant to Fed.

obtained *ex parte* from the Santa Fe Court a temporary restraining order restraining petitioner and its constituent partners from "instituting suit or filing a third party complaint against United Nuclear."* After hearing, the Santa Fe Court on April 2, 1976, issued the Injunction.**

Petitioner promptly sought, and obtained on April 14, 1976, an alternative writ of prohibition from the New Mexico Supreme Court prohibiting the trial court "from taking any action to enforce . . . [the Injunction] until the further order of this Court". After briefing and argument, the Supreme Court quashed the writ "as improvidently granted".

Reasons for Granting the Writ

In square conflict with this Court's holding in *Donovan* v. *Dallas,* 377 U.S. 408 (1964), the state courts of New Mexico have claimed the power to enjoin *in personam* federal proceedings. By so doing, they have posed a direct chal-

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R. Civ. P. 24 to intervene in an action brought in August 1975 by UNC against I&M in a different New Mexico state court and thereafter removed by I&M to the federal District Court in Albuquerque. *UNC* v. *I&M,* Civil No. 75-561 (D.N. Mex.). This action has, since April 1976, been indefinitely stayed pursuant to stipulation of those parties while each has pursued in separate courts (in Santa Fe and New York) its claims against GAC. Whether such intervention will be permitted is not presently known. In any event, the Injunction prevents GAC from asserting any claim against UNC in that action as well.

* At the court's suggestion UNC agreed that it should similarly be enjoined.

** The Gulf declaratory judgment action, discussed in the footnote at p. 9, *supra,* and the interpleader action, discussed in the footnote at p. 10, *supra,* were exempted from the Injunction on the ground that those actions were already pending when the Injunction was sought. No such exemption was made for the New York federal court action initiated by I&M although it was also then pending.

lenge to federal supremacy and raised a question of the gravest importance to the federal system.

The decisions of the New Mexico courts granting and upholding the Injunction took place in the context of an *in personam* action brought by a Delaware plaintiff in New Mexico state court against non-New Mexico defendants, and kept in the state court by the expedient of dropping the non-Delaware defendant from the original action. They took place in the context of an action just begun, even before joinder of issue. The effect of the New Mexico decisions has been to render petitioner helpless fully to defend itself in a federal lawsuit in which it is an unwilling defendant. In light of all the circumstances, it is clear that the Injunction is nothing more nor less than a usurpation by the state courts of power specifically granted to the federal courts by Congress and an unconstitutional abridgement of a federal court defendant's right to assert a complete defense.

1. *The Injunction Unconstitutionally Interferes With The Federally Granted Rights of Petitioner As A Litigant In An Ongoing Federal Proceeding.* In *Donovan,* this Court held that "state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here". 377 U.S. at 413. As shown in Point 2, *infra,* we believe that this principle renders the Injunction unconstitutional in its entirety as it applies to *in personam* federal court actions. The Injunction's most outrageous aspect, however, lies in its interference with an ongoing federal court action. In *Donovan* this Court held that state courts were without power to require a plaintiff to abandon a suit *in personam* brought in federal court where there is concurrent jurisdiction, even after a final state court judgment. *A fortiori,* then, state courts are without

power to circumscribe the claims or defenses which a defendant can assert in federal court before the state court case has even been tried. Unfortunately, however, the New Mexico state courts have failed to conform to this clear constitutional limitation. By this Injunction the New Mexico state courts have arrogated to themselves the power to limit petitioner's federal rights, as a defendant in the previously pending New York federal action, to invoke the full range of remedies that Congress and this Court, through the Federal Rules of Civil Procedure, have authorized every federal litigant to utilize in the prosecution or defense of its case.

There can be no question of petitioner's right, absent the Injunction, to implead UNC as a person "who is or may be liable to [petitioner] for all or part of the plaintiff's claim against him" in that action. Such impleader would, as intended by Fed. R. Civ. P. 14(a), afford petitioner the opportunity, if it is ordered to deliver uranium to I&M or to pay damages to I&M, to obtain in the same case a judgment against UNC compelling UNC to deliver such uranium to it or to indemnify it for the damages assessed.

In addition, there are basic common, indeed identical, questions underlying petitioner's disputes with UNC and with I&M. The 1973 Uranium Supply Agreement incorporates much of the UNC-I&M 1967 contract by reference and, at least according to UNC (in its pleadings below),* conditions UNC's obligation to deliver uranium to petitioner on petitioner's legal obligation to deliver to I&M under such contract. UNC has raised a host of alleged defenses to delivery under that contract, both in the action below and in litigation directly with I&M.** Indeed, UNC

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* Complaint in *UNC* v. *GAC,* pp. 18-19, 22-23.

** *UNC* v. *I&M,* Civil No. 75-561 (D.N. Mex.).

has asserted that it need not deliver to petitioner because petitioner need not deliver to I&M. Without UNC joined in the I&M action, the federal court might find that petitioner is obligated to deliver uranium to I&M, while the New Mexico state court, viewing identical contract provisions and other questions differently, could find that UNC is not obligated to deliver to petitioner, on the ground that petitioner is not obligated to deliver to I&M. Such a risk of inconsistent adjudications concerning identical issues highlights the prejudice to petitioner resulting from the Injunction.

The Injunction, and petitioner's consequent inability to join or implead UNC in the federal action,* operates to frustrate the intent of the Federal Rules to prevent inconsistent adjudication on issues common both to the claim of the utilities against petitioner and to petitioner's claims over against UNC. It deprives petitioner of its ultimate defensive position, that if it is found liable, UNC must be liable over to it. Additionally, it deprives petitioner of important practical benefits to which it is entitled under the Federal Rules. For example, the Injunction deprives petitioner of the broader discovery rights available against parties to an action (*e.g.*, Fed.R.Civ.P. 26, 33, 34, 35, 37). It may well deprive petitioner of the oral testimony of UNC at the trial since, if UNC is not a party, its witnesses beyond subpoena range may perceive no reason to comply with GAC's request that they testify.

The right of a defendant under the Federal Rules to assert claims against a third party by impleader or cross

* On September 9, 1976, the court in the New York federal court action denied petitioner's motion pursuant to Fed. R. Civ. P. 19(b) requesting that I&M's claims against petitioner be dismissed because the Injunction prevented petitioner from impleading or seeking joinder of UNC pursuant to Fed. R. Civ. P. 14(a) or 19(a).

claim is unquestionably an important one. As Professor Moore has stated:

> "The general purpose of Rule 14 is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence; and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant." 3 Moore, Federal Practice ¶ 14.04, at 501 (1964).

The importance attached to the rights embodied in Rule 14 is illustrated by the fact that, in order fully to effectuate the broad remedial purposes of the rule, the federal courts have held that there need not be diversity of citizenship between the defendant and third party defendant and that venue requirements need not be satisfied as between them. *E.g., Stemler* v. *Burke,* 344 F.2d 393 (6th Cir. 1965); *Agrashell, Inc.* v. *Bernard Sirotta Co.,* 344 F.2d 583 (2d Cir. 1965). To require petitioner to attempt to defend itself in federal court without the full range of protection afforded by federal law is, we submit, patently unconscionable; it is clearly not a result within the power of a state court to bring about.*

In short, this Injunction, which prevents any federal court from making a decision binding all parties affected by a given contractual provision, is an affront not only to

* Compare the reaction of another state appellate court which, recognizing the strong judicial interest in fair and expeditious resolution of controversies in forums where all relevant parties can be joined, not only reversed an injunction similar to that issued below, but deferred to the courts in a forum where all of the parties could readily be joined. *Csohan* v. *United Benefit Life Ins. Co., 33* Ohio App.2d 425, 200 N.E.2d 345 (Ohio Ct. App. 1964).

those federal supremacy considerations recognized by this Court in *Donovan* but also to judicial economy and efficiency.

2. *The Injunction Unconstitutionally Inhibits Petitioner's Access to Federal Courts Generally.* We had thought it clear, at least since *Donovan,* that state courts were utterly without power to enjoin a party's recourse to federal court in an *in personam* action, and that the extent to which a party's right to proceed in federal court was affected by a pending state court proceeding was a question within the exclusive power of the federal courts to decide. The astonishing contrary result reached below, we submit, mandates summary reversal by this Court.

The New Mexico Supreme Court, in upholding the Injunction, did not deem it necessary to state its reasons. The nearest it came to dealing with this Court's holding in *Donovan* was a comment from the bench that "the composition of the Court has changed" since *Donovan* was decided. Appendix E, p. 10a. In its briefs and arguments, UNC attempted to distinguish *Donovan* on the ground that it barred only state court interference with federal court actions already instituted against the party seeking the injunction and did not bar injunctions prohibiting filing future federal actions or injunctions prohibiting joinder of a new party in an on-going federal action. We submit that this reading of *Donovan* is entirely unwarranted either by the facts of that case or by the language of its holding.

In *Donovan,* a plaintiff class sought an injunction against construction of an airport runway and issuance of municipal bonds for that purpose. After entry of an adverse judgment and exhaustion of appeal in Texas State courts, many of the named plaintiffs, together with a group of new plaintiffs, filed a federal action raising issues substantially

identical to those in the terminated state action and seeking similar relief. This action had the effect of continuing the standstill caused by the state action, because under Texas State law the bonds could not issue while litigation challenging their validity was pending.

The City of Dallas moved to dismiss the federal action. It also applied to the Texas Court of Civil Appeals for an injunction against further prosecution of the federal action. That court refused the city's application, holding that it was without power to enjoin litigants from prosecuting an action in a federal court. *City of Dallas* v. *Brown,* 362 S.W.2d 372 (1962). On application for a writ of mandamus, the Texas Supreme Court held: (a) that the Court of Civil Appeals should issue the requested injunction and (b) that that court, if it concluded "that other suits to relitigate the same issues may be filed by other members of the class bound by the [state court] judgment", was empowered to "enjoin the filing of such suits by other members of the class". *City of Dallas* v. *Dixon,* 365 S.W.2d 919, 927 (1963). The Court of Civil Appeals then issued an injunction prohibiting all members of the class from further prosecution of the pending federal action and enjoining them from institution of "any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds". Following issuance of the injunction, the federal court granted the City's motion to dismiss. The plaintiffs in that case appealed, and certain of those plaintiffs filed a second action in federal court seeking to enjoin the Supreme Court of Texas from enforcing the previously issued injunction. Thereafter the Texas Court of Civil Appeals found each of the federal court plaintiffs in contempt of the injunction by virtue of either having

continued to prosecute the first federal action or having filed the second federal action. *City of Dallas* v. *Brown*, 368 S.W.2d 240 (Tex. Civ. App. 1963). The contempt citations directed to 26 of the federal court plaintiffs, including Donovan, were based solely on the fact that they had instituted the second federal court action after the Injunction had been issued (Record at p. 251).

This Court reversed, holding that the Texas courts were without power to restrain the federal court proceedings:

> "While Congress had seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here." 377 U.S. at 412-13.

Based on that holding, this Court vacated the judgments of contempt and remanded them for reconsideration in light of the holding that the order on which they rested was invalid.*

Nowhere in its opinion did this Court state, or even suggest, that the Texas Supreme Court order directing issuance of the injunction was invalid only in so far as it prohibited continued prosecution of existing federal actions. The order in fact prohibited the commencement of new actions as well as the prosecution of old, and it was held invalid in its entirety. The commencement of the second federal action was cited as a separate and independently sufficient ground for the judgment of contempt; as to 26 of

* On remand, the judgments of contempt were vacated. *City of Dallas* v. *Brown*, 384 S.W. 2d 724 (1964).

the respondents, the citation was based solely on their having instituted the second action; and the judgment was vacated in its entirety as having "rested on the mistaken belief that the writ prohibiting litigation by the federal plaintiffs was 'valid' 377 U.S. at 412.

The decisions below are also in conflict with the reading given *Donovan* by other state and federal courts. Circuit courts of appeals, ruling on the propriety of a dismissal of a federal district suit, have relied on *Donovan* to hold that a federal court must keep open its door despite the pendency of a state suit filed before the federal action. *Carr* v. *Grace*, 516 F.2d 502, 503 (5th Cir. 1975); *Miller* v. *Miller*, 423 F.2d 145, 146 (10th Cir. 1970). In *Bekoff* v. *Clinton*, 344 F. Supp. 642 (S.D.N.Y. 1972) and *Weisfeld* v. *Spartans Industries, Inc.*, 58 F.R.D. 570 (S.D.N.Y. 1972), *Donovan* was relied on in holding that state court injunctions against subsequent institution of federal proceedings were invalid. State authorities to the same effect include *Johnson* v. *Brown-Service Ins. Co.*, 293 Ala. 552, 307 So.2d 518 (1974) and *Crawley* v. *Bauchens*, 13 Ill. App.3d 791, 300 N.E.2d 603 (1973), *aff'd*, 57 Ill.2d 360, 312 N.E.2d 236 (1974).

Donovan does not stand alone, but is illustrative of the principle, long embedded in American constitutional jurisprudence, that the states are without power to curtail the jurisdiction of the federal courts in *in personam* actions. That principle is firmly grounded in Article III and Article VI of the Constitution. Thus, this Court has held that a state may not limit to state courts the enforcement of a right created by a state statute. *Chicago and N.W.R. Co.* v. *Whitton's Adm'r*, 80 U.S. 270 (1871). Similarly, a state's waiver of sovereign immunity for governmental units within the state may not be limited to suit in state courts. *Chicot County* v. *Sherwood*, 148 U.S. 529 (1893). Nor

may a state require out of state corporations to agree not to remove actions to federal court as a condition of doing business in the state. *Home Ins. Co.* v. *Morse,* 87 U.S. 445 (1874). The prohibition against state court injunctions of federal *in personam* proceedings did not originate with *Donovan,* but is, as the *Donovan* court noted, an "old and well-established judicially declared rule". 377 U.S. at 412-13. *See, e.g.* the cases cited by the Court at page 413 n.11. It has thus been the consistent view of this Court that federal court jurisdiction is a matter of federal law to be decided by the federal courts, and is not a matter within the province either of the state legislatures or of the state courts.*

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* The Santa Fe Court was of the view that "The institution or prosecution of other legal proceedings . . . would be vexatious and harassing". That finding rested on its view that "the parties to this suit should have their rights, duties and liabilities determined by this Court", that "determination of this lawsuit may fully resolve the disputes between the parties", and that, consequently, further litigation would be "multiplicitous". (Appendix A, pp. 1a-2a; Appendix B, p. 5a). Such conclusions (with which we emphatically disagree) are simply irrelevant under *Donovan,* which presented a far more sympathetic case for such a point of view. The plaintiffs there had prosecuted their case in the state court to a final judgment, and they had lost. Their only apparent motive for commencing the federal action was to make it impossible for the defendant to reap the fruits of its state court victory, since the mere pendency of that action, and the ensuing appeals, would operate to prevent issuance of the bonds.

In all events, the federal courts are certainly as capable as state courts in dealing with vexatious and harassing litigation.

Conclusion

Unwarranted interference by state courts with federal proceedings creates questions of paramount importance which require consideration by this Court. It should be made clear that such basic notions of federal supremacy as those embodied in *Donovan* are not to be disregarded because "the composition of the Court has changed".

For the reasons stated, the petition should be granted.

Respectfully submitted,

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September 14, 1976

APPENDIX A

Preliminary Injunction

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

State of New Mexico, County of Santa Fe

No. 50827

United Nuclear Corporation,
a Delaware corporation,

Plaintiff,

v.

General Atomic Company, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Defendants.

The above entitled cause having come on before the Court on plaintiff's application for a preliminary injunction prohibiting General Atomic Company or its partners, privies, agents, servants and employees from instituting or prosecuting any action or actions in any other forum, and notice having been given as provided by law, and the Court having considered all pleadings, affidavits, documentary evidence, briefs and argument of counsel, Finds:

1. This Court's jurisdiction over the parties and subject matter of this action attached prior to the institution of any proceedings in any other forum involving the subject matter of this action.

2. In the interest of orderly procedure, the parties to this suit should have their rights, duties and liabilities determined by this Court.

3. A determination of this lawsuit may fully resolve the disputes between the parties, thus obviating any need for further litigation concerning the subject matter of this suit.

4. Plaintiff will be irreparably injured should the injunction prayed for not be granted in that defendant has admitted that unless restrained it will seek to file additional actions against plaintiff and plaintiff will have no adequate remedy at law in that the harm sought to be avoided by this injunction will have occurred.

5. The institution or prosecution of other legal proceedings by any of the parties to this action, or their privies, would be vexatious and harassing and would be multiplicitous litigation, all of which is contrary to the speedy and orderly administration of justice.

6. The inconvenience, amount of litigation, and expense which would be suffered by the parties if other proceedings are instituted or prosecuted will be reduced or eliminated if a preliminary injunction is granted.

7. There is currently pending in the United States District Court for the District of New Mexico a case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil No. 76-032-B. There is also currently pending before the United States Court of Appeals for the Tenth Circuit an appeal entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

8. No bond or security need be given by United Nuclear Corporation as this injunction merely maintains the status quo between the parties and this preliminary injunction will benefit both parties in that the inconvenience and expense of multiplicitous litigation will be reduced or eliminated.

And the Court Concludes as matters of law that:

A. This Court has jurisdiction over the subject matter of this action and the parties hereto.

B. This Court has the authority to issue a preliminary injunction as requested by plaintiff and should do so, except, however, that this injunction

shall not operate so as to forbid Gulf Oil Corporation from prosecuting the case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B in the United States District Court for the District of New Mexico, a cause pending at the time application for this preliminary injunction was made, and the prosecution of that appeal to the Tenth Circuit Court of Appeals entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

It Is Therefore Ordered that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et. al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms.

Submitted:
Harry L. Bigbee
One of Pltfs. Attys.
William Federici
One of the Defendant's
Attorneys.

Edwin L. Felter
District Judge

APPENDIX B

Opinion of Felter, *D.J.*

STATE OF NEW MEXICO

FIRST JUDICIAL DISTRICT

March 29, 1976

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Re: UNITED NUCLEAR CORP. v. GENERAL ATOMIC CO.
Santa Fe County #50827

Dear Sirs:

Consideration has been given to the pleadings, affidavits, testimony, briefs and arguments of counsel in the above-entitled and numbered case. Three issues are now before the Court for decision, namely:

1. Respondents' Motion to Dismiss for want of in personam jurisdiction over respondent.

2. Respondents' Motion to Dismiss for failure to join indispensable parties.

3. Plaintiff's application for a preliminary injunction.

I am of the opinion that this Court has in personam jurisdiction over respondents herein and that no defect in jurisdiction or otherwise exists by reason of any failure to join indispensable parties. Therefore, respondents motion to dismiss for lack of in personam jurisdiction and their motion to dismiss for failure to join indispensable parties are both denied.

Both parties made strong and convincing arguments of their respective positions upon plaintiff's application for a preliminary injunction. Either way the Court should rule on this issue would result in some inconvenience and expense to the losing party. I am satisfied that the Court has the authority to grant such a preliminary injunction except insofar as are concerned federal cases where the jurisdiction of the Court has already attached.

In the interest of orderly procedure, it occurs to me that the parties to this lawsuit should have their rights, duties and liabilities determined in this forum upon the merits of this case at the earliest possible date. Conceivably, such a determination could obviate in other forums, other litigation connected with the subject matter of this lawsuit. I believe that the sum total of inconvenience, litigation and expense, without analyzing which party to the greater extent may be affected thereby, can be ameliorated or reduced by the granting of the preliminary injunction. I believe that the ends of justice will be served better by the granting of the preliminary injunction than would be the case if it were refused. I am confident that once this case is decided on its merits, irrespective of which party prevails, that any remaining rights, duties or liabilities between the parties and those of any other interested parties can be and will be settled or litigated appropriately.

Accordingly, respondents will be enjoined preliminarily, from filing or prosecuting any other action or actions

against plaintiff in any other forum, relating to any of the rights, claims or subject matter of this lawsuit. The preliminary injunction shall include ordinary litigation, third party proceedings, arbitration proceedings and any and all other methods of prosecuting actions, claims, demands, etc. Jurisdiction of the District Court of the United States for the District of New Mexico already has attached in an action wherein Gulf Oil Corporation is plaintiff and United Nuclear Corporation is defendant. That case is excepted from the operation of the preliminary injunction hereby granted as required by Donovan v. City of Dallas, 377 U.S. 408, 84 S. Ct. 1579 (1964) rehearing denied 85 S. Ct. 14.

Counsel for plaintiff should submit to the Court for signature and filing an appropriate order consistent with the Court's ruling. Respondents may have twenty days from the date of entry of such order within which to plead to the merits or file such responsive pleadings as may be proper.

Very truly yours,

EDWIN L. FELTER
District Judge

ELF/ama

APPENDIX C

Alternative Writ

IN THE SUPREME COURT

Of the State of New Mexico

General Atomic Company, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

v.

The Honorable Edwin L. Felter, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

To:

Hon. Edwin L. Felter
Judge of the District Court
Santa Fe, New Mexico

and

United Nuclear Corporation,
real party in interest

Greetings:

Whereas, a verified petition having been filed in the above entitled cause by Petitioner General Atomic Company, and good cause appearing for the issuance of an alternative writ, and a copy of the petition for said alternative writ being attached hereto as Exhibit "A";

Alternative Writ

Now, Therefore, you, the Respondent, Hon. Edwin L. Felter, Judge of the District Court of Santa Fe County, are hereby prohibited and restrained from taking any action to enforce the preliminary injunction entered April 2, 1976 in District Court Cause No. 50827 entitled United Nuclear Corporation v. General Atomic Company, Santa Fe County Cause No. 50827, until the further order of this Court; and to show cause by the filing of a response to said writ on or before the 26th day of April, 1976, why you should not be so prohibited and restrained and further to show cause why this alternative writ herein issued should not be made permanent.

Petitioner's Brief shall be filed on or before the 7th day of May, 1976; Respondent's Brief shall be filed on or before the 19th day of May, 1976; and oral argument will be had on the matter on the 9th day of June, 1976, at the hour of 9:00 o'clock, A.M., in the Supreme Court Hearing Room, Supreme Court Building, Santa Fe, New Mexico.

Witness, The Honorable LaFel E. Oman, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of April, 1976.

Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

[Seal]

APPENDIX D

Order of The Supreme Court of New Mexico

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO

Wednesday, June 16, 1976

No. 10870

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

HON. EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

This matter coming on for consideration by the Court upon petition for alternative writ of prohibition or alternative writ of superintending control, and the Court having issued said Writ and having heard oral argument and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED by the Court that the alternative writ heretofore issued in the above entitled cause on the 14th day of April, 1976, be and the same is hereby quashed as having been improvidently issued.

Attest: A true Copy
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the court.

* * *

Mr. Eastham: If it please the Court, Mr. Robb will, after I conclude my simple point, get into the various issues in the various cases. My simple point is one that stands alone. It does not depend on the facts. It does not depend on what other cases are or are not filed around the country. It is a point that is completely controlled by the 1964 decision of the United States Supreme Court in *Donovan* v. *Dallas* and the attempted distinction of *Donovan* by opposing counsel simply does not hold up under analysis. *Donovan* makes it clear beyond dispute that Judge Felter acted beyond his jurisdiction when he purported to enjoin General Atomic and its privies from taking any action in Federal Court—*any* action in Federal Court. *Donovan* is basically founded in the United States Constitution, Articles III and Article VI, Article III, of course, being the judicial power article which sets it up in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish and states that the judicial power shall extend to all cases in law and equity, between citizens of different states and a bunch of other things. And then, of course, in Article VI we have the supremacy clause that states that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Justice Sosa: Mr. Eastham, even that case, though, had a vigorous dissent in it and the composition of the court has changed, has it not?

Mr. Eastham: Yes, it's a 6 to 3 decision that has stood on the books since 1964 without any serious attack of any kind that I have seen, and I certainly believe that it's the law—

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Justice Sosa: Well, did the *Donovan* case—the *Dono van* case did not mention as Judge Felter's Order did, vexatious and contentious litigation as apparently this—.

Mr. Eastham: Well, it didn't in one sense, Mr. Justice Sosa. It did certainly by implication because the whole basis of the dissent was—gosh, you guys, you six guys that are in the majority are ruling that you can bring vexatious cases, harassing cases, anything else you want in Federal Court. And I think by that dissent pointing that out I think it is made quite clear that the majority who obviously reads the dissent knew exactly what they were doing, they were saying that there was a right to bring federal actions be they vexatious, harassing, any other kind. The only exception that the Court spelled out was the *in rem* exception saying that once a Court gets jurisdiction of a *res,* whether it's a state or a federal court, that court has exclusive jurisdiction thereafter.

Justice Montoya: Except that the facts in the *Donovan* case and the facts in this case are quite dissimilar in the way the thing arose.

Mr. Eastham: Yes, *Donovan* is certainly a much more vexatious type of situation than ours. As you probably know from looking at it, Donovan on behalf of a bunch of people in Dallas brought suit in State Court, a class action to stop some airport bonds. He lost all the way through state court including denial of certiorari. Then he starts again; he starts in federal court, and he after bringing that case which had the practical effect of stopping the issuance of the bonds, the city goes in to get an injunction against him in state court.

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Justice Montoya: No, the Texas Supreme Court took it upon itself to order the Court of Appeals to—

Mr. Eastham: Right, I'm trying to go through the chronology. He first went into the Texas Court of Civil Appeals which ruled that they had no power to issue such an injunction. Then he took—then the city took a separate action in the Texas Supreme Court. The Texas Supreme Court in March of 1963 ordered, in effect, the Court of Appeals, saying if you don't issue a writ of prohibition, by golly, we will.

Justice Montoya: We'll order you to issue it, right.

Mr. Eastham: So the Court of Appeals being a very obedient court as Court of Appeals should be, proceeded on the 16th—I think these times are now crucial—on the 16th of April the Texas Court of Civil Appeals issued the writ prohibiting basically two things—they prohibited the plaintiffs and Mr. Donovan from carrying on any further in the pending federal court case and they further prohibited and enjoined Mr. Donovan and the plaintiffs from instituting any other litigation, lawsuits, or any actions relating in any way to the runway and the airport revenue bonds. Seven days later—seven days later on April 23, Mr. Donovan for the first time naming himself as a plaintiff joined by a number of the other plaintiffs in the federal action, brought a new suit—this was a new suit—in the United States District Court against the Texas Supreme Court and the Texas Court of Civil Appeals to restrain enforcement of this writ that was issued April 16. On May 22, 1963 the Texas Court of Civil Appeals, pursuant to motion filed by the City, entered a contempt judgment, fined the individual plaintiffs

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

including, I might add, some plaintiffs who had joined the second federal court action—the new post-injunction federal court action after it had been filed and had never been a plaintiff in any other action. Those persons were fined and Mr. Donovan was given twenty days in jail which he served. And it is shown in the records of the Supreme Court the sentence for Mr. Donovan and the fines for a number of the other persons was based solely on the fact that they filed the new action in Federal Court, not based on continuing with the pending action but they were fined and jailed based solely on the new federal action. Now this chronology in the *Donovan* case I've given you is to show exactly what the facts were because they are important and the chronology is important. Now Mr. Justice Black in speaking for the majority six justices outlined the true issue and I'm skipping the first sentence of *Donovan* which I will come to later but he towards the end of the case said the true issue was the propriety of a state court's punishment of a federal court litigant for pursuing his rights, pursuing his rights, to federal court remedies, and the court concluded that right—this is the right to pursue federal court remedies—was granted by Congress and cannot be taken away by the state. **The Texas courts were without power—that's the phrase the court used—without power** to take away the federal right by contempt proceedings or otherwise. Thus it's clear from looking at the facts and the language of the court that the court based its decision not on some principle of comity that the federal court proceedings should be allowed to continue once begun, but rather on the much more basic rationale that the right of a person to litigate in federal court cannot be taken away by the

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

states. The right to litigate can't be taken away, and obviously the right to commence a federal action in a federal court is a federal right to the same extent as the right to continue or complete such a pending action. Now the ingenious argument of opposing counsel before the lower court to the effect that the *Donovan* case applies only to pending cases apparently had its genesis in a presumption made by an author in 42 Am. Jur. 2d, § 236 which was quoted on page 4 of United's brief. This unknown author stated with regard to the *Donovan* rule:

> "Presumably the foregoing rule is limited to instances in which an action is actually pending in the federal court at the time the injunction is sought."

Interestingly, the only federal authority cited by this author was *Princess Lida v. Thompson,* the case decided in 1939 cited in the *Donovan* case, cited by the majority, the one holding that the *in rem* jurisdiction becomes exclusive in the first court that gets ahold of the *res.* So it doesn't support this presumption. And the only other authorities were three old state court decisions ranging in time from 1925 to 1950, all well before *Donovan* so how he arrives at this presumption based on those authorities is beyond us; and we have found no authorities since *Donovan* indicating that it applies only to pending cases and the reason is quite obvious—it can't because it did apply to a non-pending case, the contempt was issued for a non-pending case. *Donovan* included both sides of the coin—both the pending case and continuing in it—some people were punished for

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

that; and the filing of a new case, and some people were punished for that. And as I stated the—some of the persons held in contempt were held in contempt solely for bringing this new federal action. Now, opposing counsel attempts to get some aid and comfort from the language of Justice Black in the beginning of the *Donovan* opinion which talks about the question presented is whether a state court can validly enjoin a person from prosecuting an action in personam in a district or appellate court of the United States and so forth; making great point that the word "prosecution" somehow implies continuing something that already exists. Again, this is done without benefit of authority, this reading of the word "prosecution" as meaning something like continuing. In our reply brief we have set out authorities, including the United States Supreme Court, the Seventh Circuit, Black's Law Dictionary and Webster's Third New International—that's the latest great biggy—showing that the word "prosecution" includes commencing, conducting, carrying on and concluding. It doesn't mean carrying on solely. It includes the beginning, the middle and the end. We submit that this ruling of *Donovan* is clear. A state court cannot enjoin a person from bringing or conducting or concluding an in personam federal court action. The injunction issued by Judge Felter did exactly this. Accordingly, the writ of prohibition should be made permanent insofar as the injunction purports to prevent General Atomic and all the other persons and entities enjoined in that order from taking action of any kind in federal court. As I stated, my point does not depend on the facts. It goes to a whole question of power. Now Mr. Robb will go into the other aspects of this matter. Thank you.

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Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Mr. Bigbee: . . . O.K., here we've got *Donovan* and what does it say. The question here is whether a State Court can validly enjoin a person from prosecuting an action in personam and at this time Mr. Eastham says and so forth and so forth but I'll read the rest of the sentence, in a District or Appellate Court of the United States which has jurisdiction both of the parties and of the subject matter.—

Justice Oman: Let me ask you a question on that Gulf suit. I understand that is pending on your motion to dismiss.

• • •

Mr. Bigbee: Now here's our lawsuit and here's what the case which has jurisdiction both of the parties themselves. Yes, I've looked in Black's Dictionary. You don't prosecute anybody in vacuum. You've got to first file something. If the District Attorney decides to prosecute somebody, he's first got to get an indictment or a criminal complaint, then you go on, but that is not what's involved in *Donovan*. It says "further prosecute" and now I'm going to state the *Donovan* case real succinctly and I believe correctly. There's been a bunch of Love Field people and they had filed a suit in the Texas court and they had lost their lawsuit and there was a final judgment in it after appeal applying up to the Supreme Court of the United States. It was over. Period! Then they turned around and filed another suit after going through Texas all the way up to the Supreme,—the Texas Court of Civil Appeals—Supreme Court of Texas—Supreme Court of the United States. They filed a second suit in the Federal Court where it is claimed the matter is res judicata and just the statement at the bottom of the opinion the city filed a

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

motion to dismiss and an answer to the complaint in Federal Court. This is the second case, but the State case is over. But at the same time the city applied to the Texas Court of Civil Appeals for a writ of prohibition which was denied. The Supreme Court of Texas says, issue it. Now Texas Court of Civil Appeals' decision is interesting cause they hit the question right on the nose. They said the issue here is not vexatious and multiplicitous litigation cause there's only one case. It isn't simultaneous multiplicity of actions. The Texas case is over. There is nothing else to be done. The filing of a second case doesn't interfere with that action. The judgment's there. And they said the question is who determines the res judicata effect of the first judgment. That's what the Texas Court of Civil Appeals says and the Supreme Court of the United States said they hit it pretty close and the Texas Court of Appeals said this: If the res judicata effect is to be determined by the court, first court having the controversy, then it would be not only the determining factor as to whether it was res judicata but it could never be submitted any place else. Now they had res judicata effect. The Supreme Court of the United States and the Texas Court of Civil Appeals says it should be determined by the first court that's there, on that question of res judicata. The second suit's file. O.K., complete answer, it was sustained is, it is res judicata. It was good, but that was up to the Federal Court and was an obligation of full faith and credit to determine. You are not having two or three lawsuits going at once. Now, the Supreme Court of Texas erroneously tells Mr. Donovan that he is to dismiss the federal suit; in other words the federal, the Supreme Court of Texas, has taken it upon itself to make the determination whether the issues in the

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Texas court are identical to those of the Federal Court and res judicata should apply. Mr. Donovan doesn't do it. He shows his objections to dismissal and the second case filed there did not involve the merits of Love Field; it was just like when he refused to consent to the dismissal of the federal action. He was violating this erroneous order. He also filed a second suit in the federal court to prohibit the Supreme Court of Texas from keeping him from litigating the res judicata effect in the federal court. It didn't raise the issues of bondage, but he wasn't complying with that order. Now we have a very different situation. There was no "if" in Love Field case in the original *Donovan* case. Let's assume that those plaintiffs had filed, first a suit in State Court and they were trying it. Then they sue, filed another case in Federal Court involving the same issues. And then maybe another Federal Court District or another state or two where you have multiplicitous, simultaneous litigation. That was not presented. The very question of the minority opinion was they would have applied the rule of multiplicitous, vexatious litigation to successive actions. That is not our situation. What we're objecting to is simultaneous multiplicity and vexation. We filed our suit, we applied for TRO's, were turned down. They filed two suits, never just one. Two. Then we find out they want to join us in the Southern District of New York; they filed another one in North Carolina. They didn't quite hear—I don't if it's fully developed in the pleadings here—or both—they filed a lawsuit there and they've alleged we weren't joined on account of this order. They want to sue us all over the United States. Now they got their two bites of the apple. We filed our lawsuit and they

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properly filed the case in Albuquerque, both of them. It's up to that court—interpleader would take precedence if it's reversed. I don't think there's interpleader jurisdiction. Those cases—in the Gulf case it's a matter of comity which court should continue in exercise and that will be submitted to Judge Bratton. We're not asking this court to tell Judge Bratton what he should do on that case. The *Donovan* rule, I think, may prohibit it. There are two real good cases. One following and one before the *Donovan* case. *Poole* v. *Mississippi Publishers* case which is there—the *Poole* case which is in our index. It puts a whole lot of cases together. The second case is that *600 California* case, just a Federal District Court opinion, but they pull all the intervening decisions together on what I'll call multiplicity simultaneous actions involving the same subject matter rather than successive actions filing one suit after another suit where the only issue is which court has jurisdiction to determine the res judicata effect. The first court or the second court where that issue is pending. The Supreme Court of the United States says res judicata is to be determined by the case, by the court where the second suit is filed, and I don't know of anybody in New Mexico who's ever tried to do it differently . . .

Mr. Bigbee: . . . So we think Judge Felter properly exercised his discretion; he had jurisdiction under the *Donovan* case; he had jurisdiction under the general weight of authority, and he exercised that jurisdiction and he had the power because we are not yet a party and jurisdiction has not yet attached against us in New York or North Carolina, which is the test of *Donovan*. I thank you very much.

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Mr. Eastham: Just a couple of quick comments about *Donovan*, first Mr. Bigbee read the language of the question relating to can it validly enjoin a person from prosecuting an action in personam in a district or appellate court of the United States which has jurisdiction, both of the parties and the subject matter. That jurisdiction obviously refers to whether they have the right to take this matter, whether it's then pending or in the future, has to mean that because, in fact, one of the actions involved in *Donovan* was an action which took place after the injunction. So that jurisdiction is a general jurisdictional clause; it didn't say, Black didn't say which has *taken* jurisdiction both of the parties and the subject matter but which *has* jurisdiction. That is an entirely different meaning. Secondly, and I think I answered this when a question was asked, I think, by Mr. Justice Sosa about the majority opinion on saying anything about vexation. That is true but the dissent and—there's three different places and at the end they say, "In any event, the statutory boundaries of federal jurisdiction are hardly to be regarded as a license to conduct litigation in the federal courts for the purpose of harassment." They were saying that in dissent—they lost.

Justice Sosa: My question was this: They said that you could not be enjoined from seeking redress in the federal courts if there was a Congressional—given authority by authorization of Congress, but my question again is in this particular case there are two cases that are presently pending in Federal Court already involving the same issues and the same subject matter that you have not been enjoined on and my question was—did you read into *Donovan* the fact

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that they said that that type of vexatious litigation could never be enjoined.

Mr. Eastham: That what's I read—

Justice Sosa: That's what you read into it.

Mr. Eastham: And Stewart, from in his dissent, in an earlier place says the power of a court of equity to enjoin persons subject to its jurisdiction from conducting vexatious and harassing litigation in another forum has not been doubted until now; in other words he's saying that that's the effect of the federal court action and I think the answer to it is, and I understand how this would disturb a judge, the answer is that the federal courts certainly have power to stay, to hold in abeyance any action. In other words, if the federal courts feel that there has been some vexation or harassment they can take care of the problems. It's not as though it's a remediless situation. Finally, Mr. Bigbee mentions the one post-*Donovan* case that he apparently is relying on—*500 California Corporation versus Hargine;* it didn't relate to *Donovan*—had nothing to do with *Donovan;* it was a case where a federal court issued an injunction against a state court action and that is a different thing. It's pursuant to a statute of the United States and relates to what federal courts can do as to the states. *Donovan* relates as to what the states can do with federal and I think it's quite clear.

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